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No. 90-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRAILER MARINE TRANSPORT CORPORATION,
Petitioner,

v.

ZAPATA GULF MARINE CORPORATION,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF

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REPLY BRIEF

In its petition for a writ of certiorari Trailer Marine Transport Corporation (TMT) demonstrated three things: (1) respondent's motion for prejudgment interest under § 4(a) of the Clayton Act was a motion for sanctions to punish litigation misbehavior; (2) a motion for litigation sanctions is not a motion under Fed. R. Civ. P. 59(e) to alter or amend a judgment; and (3) the Fifth Circuit, in this case, and the Second Circuit, in *Fisher* v. *Klein*, 873 F.2d 626 (2d Cir. 1989), have held that a motion for sanctions is a Rule 59(e) motion, and are thus in conflict with the Third, Fourth, Eighth, and Eleventh Circuits, which have held that it is not. The result is that a notice of appeal, filed after entry of judgment but while a motion for sanctions is pending, is fully effective in four circuits and a nullity in two circuits. This Court's decisions show that the Fifth and Second Circuits are wrong and the other four circuits are correct.

Respondent's claim (Opp., at 8) that *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), has produced certainty in the lower courts is flatly wrong. The erroneous decisions of both the Fifth and Second Circuits were made *after Osterneck's* reasoning decisively excluded motions for sanctions from the ambit of Rule 59(e) motions. In fact, the decision of the Fifth Circuit in this case even came after this Court in *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2456 (1990), equated a motion for litigation sanctions with motions seeking "costs [and] attorney's fees," which are not motions to alter or amend the judgment.

TMT submits that the conflict among the circuits, which was not cured by *Osterneck* and *Cooter & Gell*, requires resolution by this Court. TMT further respectfully submits that the Fifth and Second Circuits are so clearly wrong that the writ should be granted and the decision of the Fifth Circuit here summarily reversed.

Respondent Zapata Gulf Marine Corporation (Zapata) offers two replies to TMT's demonstration. One rests upon a mischaracterization of § 4(a) of the Clayton Act as well

as the record in this case; the other upon a complete misreading of this Court's decisions.

1. Zapata argues that it did not file a motion for sanctions and that § 4(a) of the Clayton Act does not provide for sanctions. Opp., at 11-16. Both assertions are clearly incorrect. Nothing but sanctions for litigation misbehavior were sought in the motion for prejudgment interest and *only* such sanctions are authorized by the statute.

Both points are shown by the complete disparity between the factors a district court considers in deciding a motion to alter or amend a judgment, on the one hand, and, on the other, the factors Zapata urged in its motion for prejudgment interest and those specified by § 4(a) of the Clayton Act.

In *Osterneck*, the Court listed some of the factors the district court considers when evaluating a motion for prejudgment interest that, in fact, seeks to alter or amend the judgment. These were "whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness." 489 U.S., at 176.

Not one of these factors, nor anything else going to the merits or to compensation, was raised in Zapata's motion for prejudgment interest. That motion had everything to do with TMT's "efforts to intentionally delay this litigation" (Pet. App. 40a) and nothing to do with the *Osterneck* factors. In fact, while the motion was made for Clayton Act prejudgment interest, it could just as readily have been made under other authority.

Rule 11 authorizes a court to award sanctions in the form of prejudgment interest, *Davis v. Veslan Enterprises*, 765 F.2d 494 (5th Cir. 1985), for litigation conduct that "cause[s] unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11. The courts also have *inherent* authority to award sanctions against a party

who " 'shows bad faith by delaying or disrupting the litigation'." *Chambers* v. *NASCO, Inc.*, No. 90-256 (June 6, 1991), slip op., at 12 (quoting *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978)). And, in a Clayton Act case, the court may award sanctions in the form of prejudgment interest for engaging in conduct "for the purpose of delaying the litigation or increasing the cost thereof." 15 U.S.C. § 15(a). Zapata sought a Clayton Act prejudgment interest sanction for precisely these purposes. It summed up its motion by asserting:

> The process [from complaint to final verdict] took nearly four years because of the dilatory tactics of TMT: five continuances of trial dates, three months to stay the proceedings, two trips to the Fifth Circuit, a motion to recuse, three months of a Rule 11 investigation, two 12(b)(6) motions to dismiss, four summary judgment motions, seven frivolous counterclaims and third-party claims, and refusals to respond to discovery so as to require three motions to compel. TMT has never stopped in its efforts to delay this litigation and increase Plaintiff's costs. If ever a case was appropriate for the imposition of prejudgment interest, this is the case. (Pet. App. 47a-48a)

Not one of the factors itemized by Zapata in support of its motion had anything whatever to do with the merits of or compensation for Zapata's antitrust claim. Consideration of the motion simply did not require any reconsideration of the underlying judgment. Because the motion was exclusively for litigation sanctions, it was completely collateral to the judgment on the merits.

And that was the way the district court treated it. The court's Order and Reasons (Pet. App. 54a) denied prejudgment interest, saying that some of TMT's litigation behavior was "frivolous" but there was "no evidence establishing that TMT acted in bad faith." *Id.*, at 63a. The court added, applying another standard of § 4(a) of the Clayton Act, "TMT was never found to have violated any rules sanctioning dilatory behavior." *Id.*

Thus, it does not matter whether § 4(a) of the Clayton Act authorizes prejudgment interest for anything in addition to sanctions for litigation behavior. Whatever § 4(a) authorizes, Zapata's motion was solely for sanctions and the district court's decision was solely about sanctions. Thus, regardless of how § 4(a) is construed, this case squarely presents the question whether a motion for litigation sanctions is a motion to alter or amend the judgment under Rule 59(e). That is a question to which the courts of appeals have given different answers and which this Court should definitively resolve.

It is clear, in addition, however, that § 4(a) of the Clayton Act is entirely a sanctions statute. *See* Pet., at 15-18.[1] The *Osterneck* factors are not only *not required* to be considered under § 4(a) of the Clayton Act, they are factors that § 4(a) *forbids* the district court to consider.

Where, as here, the proper interpretation of a statute is clear from its plain language, that is where the inquiry should end. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989). Zapata overlooks completely the plain words of § 4(a), and instead focuses exclusively on its legislative history. *See* Opp., at 11-13. However, even if it were necessary to consult the legislative history here, it is manifest that Congress intended that Clayton Act prejudgment interest be imposed solely as a sanction. *See, e.g.*, 126 Cong. Rec. 23,626 (Aug. 28, 1980) (statement of Rep. McClory) ("The most controversial issue committed

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[1] Zapata's efforts to distinguish sanctions imposed under § 4(a) of the Clayton Act from sanctions imposed under other provisions fall far short of the mark. For example, Zapata asserts that litigation sanctions are "primarily, if not entirely, directed at counsel misconduct," and that Clayton Act prejudgment interest "can only be assessed against the defendant." Opp., at 15; *id.*, at 12. But § 4(a) is directed at the conduct of the party *and* its "representative." *See* 15 U.S.C. § 15(a). Moreover, the fact that the party must pay the fine for the misconduct of its attorney is a feature of § 4(a) that is common in the law. *See, e.g., Chambers*, slip op., at 6 (affirming imposition of $996,644.65 in attorney's fees as sanction against party); *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991).

to conference concerned the basis for awarding prejudgment interest. The House approach was to view such awards as a *penalty* for, and a *disincentive* to, *dilatory conduct*. The Senate approach was broader. It viewed such awards as compensating plaintiffs for the loss of the use of the money the plaintiff would have had absent the violation . . . . [*T*]*he House version . . . was the version agreed to in conference.*") (emphasis added).[2]

A motion for sanctions is not a Rule 59(e) motion because, *inter alia*, "sanctions may be imposed years after a judgment on the merits," *Chambers*, slip op., at 22, whereas a Rule 59(e) motion "shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). While a motion under the Clayton Act for prejudgment interest must be "promptly made"—just as a Rule 11 motion must be made "promptly"—neither Rule 11 nor Clayton Act sanctions motions need be made within 10 days of the entry of judgment.

Zapata has not responded, because no response is possible, to the point that a Clayton Act prejudgment interest motion *cannot* be a Rule 59(e) motion because the former need not be made during the limited period prescribed for making the latter. A simple hypothetical illustrates that point. In an identical case, suppose that a plaintiff were to file a Clayton Act prejudgment interest motion on either

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[2] *See also id.* (statement of Rep. Mazzoli) ("the court must consider whether the parties to the litigation: Acted intentionally or in bad faith to delay the proceedings; or, whether either party violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior; or whether either party engaged in conduct primarily for the purpose of delaying or increasing the cost of the litigation . . . . The courts are limited to *only* these factors in determining whether to award prejudgment interest.") (emphasis added).

Zapata's reliance on the statement of former Assistant Attorney General John Shenefield's testimony, Opp., at 12, is completely misplaced. In addition to being taken out of context, *see* H.R. Rep. No. 875, 96th Cong., 2d Sess. (1980), at 5-7, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2766, 2770-72, that comment related to a version of the legislation that was subsequently superseded.

the ninth or the eleventh day after entry of the judgment and the defendant files its notice of appeal prior to disposition of the motion. Both motions were certainly "promptly made." Under Zapata's interpretation of *Osterneck*, the former motion is a timely Rule 59(e) motion and nullifies the notice of appeal, but the latter is either an untimely Rule 59(e) motion that has no effect on the notice of appeal or a timely non-Rule 59(e) motion that also has no effect on the notice of appeal. In short, Zapata's theory of *Osterneck* creates a "bright-line" rule that depends entirely on labels and when a motion is filed, the identical approach summarily rejected by this Court in *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265 (1988).

2. Zapata contends that *Osterneck* stands for the astounding proposition that "[a] motion for prejudgment interest, discretionary or mandatory, *and regardless of its relationship to the 'merits,'* is a motion to alter or amend a judgment under Rule 59(e)," Opp., at 16 (emphasis added). This Court has never held that a motion is one to alter or amend the judgment *whether or not it seeks to alter or amend the judgment*, and it has repeatedly held to the contrary. *White* v. *New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982): "Rule [59(e)] was adopted, to 'mak[e] clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of judgment," 455 U.S., at 450, so that there is a clear distinction between *a Rule 59(e) motion which seeks "reconsideration of matters properly encompassed in a decision on the merits," id.*, at 451 (emphasis added), and a motion that "raises legal issues collateral to the main cause of action . . . to which Rule 59(e) was never intended to apply." *Id.*[3]

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[3] *See also Buchanan*, 485 U.S., at 268-69 (assessment of costs "does not involve reconsideration of any aspect of the decision on the merits," was therefore not a motion to alter or amend the judgment, and "[r]espondents' inaccurate designation of their costs request as a Rule 59 motion cannot change this fact"); *Budinich* v. *Becton Dickson & Co.*, 486 U.S. 196, 199 (1988) (a "question remaining to be decided after an order ending litigation on the merits does not prevent finality

The law is clear. A Rule 59(e) motion must seek revision of the judgment. There has never been a case in which the Court held that a postjudgment motion which addressed neither the merits nor the damages is a Rule 59(e) motion. A motion for litigation sanctions, as *Cooter & Gell* said, does not seek such a revision. And, as this Court held only five days ago, litigation sanctions do not depend on the merits of the underlying lawsuit, "but on how the parties conduct themselves during the litigation." *Chambers*, slip op., at 19. The underlying claim is not implicated at all "where sanctions [are] imposed for conduct during the litigation." *Id.*, at 20. It follows that the sanctions motion here did not render TMT's notice of appeal ineffective.

Zapata's answer is that *Osterneck* changed the law, and, rather than building on *White*, *Buchanan*, and *Budinich*, overruled all of those decisions. According to Zapata, the name of the motion now controls, not the motion's relation to the judgment. Thus, since *Osterneck* dealt with a motion for prejudgment interest, "all motions for prejudgment interest are motions under Rule 59(e)," Opp., at 13, to alter or amend the judgment, even if they do *not* seek in any way to alter or amend the judgment. Such an exaltation of label over substance is breathtaking. It is also entirely contrary to *Osterneck* as well as *White*, *Buchanan*, and *Budinich*.

Osterneck involved a motion for equitable, nonstatutory prejudgment interest of a traditional type, completely different from Clayton Act prejudgment interest. The Court held that it was a Rule 59(e) motion because "a district court *must* examine—or in the case of a post-judgment motion, reexamine—matters encompassed within the merits of the underlying action." 489 U.S., at 176 (emphasis added). The Court, as already noted, listed factors to be considered. *See supra* page 2.

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if its resolution will not alter the order or moot or revise decisions embodied in the order").

The *Osterneck* factors go to the adequacy of plaintiff's compensation and draw into question matters encompassed in the judgment. Yet Zapata reads *Osterneck* to mean that a filing captioned, "Motion for Prejudgment Interest as a Rule 11 Sanction," though it had nothing to do with the judgment, would nevertheless be a motion to alter or amend the judgment.

That position is directly at odds with the entire text of *Osterneck*. But Zapata contends that the text is cancelled by a footnote. That note, 489 U.S., at 177 n.3, quoting *Budinich*, states, in pertinent part: " 'Courts and litigants are best served by the bright-line rule, which accords with traditional understanding,' [citation omitted] that a motion for prejudgment interest implicates the merits of the district court's judgment." The motion for prejudgment interest involved in *Osterneck* did implicate the merits of the judgment. But the Court most certainly was not saying that a motion for prejudgment interest as a litigation sanction would be a motion to alter or amend the judgment even though it had no relation whatever to the judgment. That would be to overturn, in a footnote, the rationales of *White*, *Buchanan*, *Budinich*, and *Osterneck* itself.

If that were the case, the Court would hardly have troubled to reason, in the same footnote, that mandatory prejudgment interest is to be treated like discretionary prejudgment interest because it, too, "serves to 'remedy the injury giving rise to the [underlying] action,' [citing *Budinich*, 486 U.S. at 200], and in that sense is part of the merits of the District Court's decision." 489 U.S., at 176-77 n.3. If Zapata's reading were correct, the Court need only have said, "A motion for prejudgment interest, of any kind, is a Rule 59 motion." Instead, in the footnote as in the text, the application of Rule 59(e) is invariably linked to compensation, to remedy, or to the merits of the underlying action.

The Court's "bright-line rule," as it has repeatedly held, is whether the motion requires the district court to reconsider the merits decisions or the damages encompassed

in the judgment. The bright-line-by-label rule Zapata would substitute has been rejected by this Court in *Buchanan*. The Fifth Circuit there adopted the rule that a motion filed within 10 days after the judgment, asking that the judgment be "amended" to include costs, and invoking Rule 59, was a motion to alter or amend the judgment which, as here, made the notice of appeal ineffective. That was precisely the type of "bright-line rule" that Zapata urges here. But this Court rejected it because the motion did not "involve reconsideration of any aspect of the decision on the merits." 485 U.S., at 268. And the Court should do the same with the Fifth Circuit's resurrection of *Buchanan* in this case.

Courts have had no difficulty discerning the sharp distinction between sanctions in the form of Clayton Act prejudgment interest and traditional, equitable prejudgment interest. *Fineman* v. *Armstrong World Industries, Inc.*, Civ. No. 84-3837 (D.N.J. May 6, 1991), relying upon the district court's decision in this case, rejected a claim for Clayton Act prejudgment interest because the defendant's "presentation of its defenses and counterclaim does not come within any of the categories interdicted by the . . . statute," slip op., at 4, and the defendant "did not assert frivolous positions in the case at bar." *Id.*, at 5. However, in the same opinion, the district court granted "simple prejudgment interest" as authorized by New Jersey law, *id.*, a remedy which the New Jersey courts had held was intended "to compensate the plaintiff for the loss of income that would have been earned on the judgment had it been paid earlier." *Ruff* v. *Weintraub*, 105 N.J. 233, 519 A.2d 1384, 1390 (1987). The court in *Fineman* had no difficulty whatever in distinguishing between prejudgment interest as a sanction and prejudgment interest as compensation. Indeed, if distinguishing motions that require reconsideration of the judgment from motions that do not were impossibly difficult, the basis of this Court's Rule 59(e) decisions would be destroyed.

Zapata contends that it would defeat the policies of certainty and predictability cited in *Osterneck* to hold that a

motion for sanctions in the form of Clayton Act prejudgment interest falls outside the scope of Rule 59(e). But the opposite is true. The federal courts have inherent authority and are expressly authorized by numerous other statutes and rules to impose a wide variety of sanctions. *See Chambers*, slip op., at 9-17; *id.*, slip op., at 2-3 (Kennedy, J., dissenting) (discussing the panoply of express sanctioning provisions). Such sanctions, as the Fifth Circuit has held, *see supra* page 2; Pet. at 20, include prejudgment interest. To make the finality of a judgment depend not upon the *White-Buchanan-Budinich-Osterneck* criteria but entirely upon the nature, form, or label of the sanction requested in a particular case would destroy any semblance of consistency and predictability in the federal appellate process.

The confusion in the courts of appeals should be cleared up by the grant of certiorari in this case. If certiorari were denied, the bar would not be sure whether a motion for sanctions because of dilatory litigation tactics is or is not a Rule 59(e) motion or whether a motion under § 4(a) of the Clayton Act is or is not a motion for sanctions. The upshot would be continued uncertainty about when judgments are final and when notices of appeal must be filed. That would surely produce more unjust losses of rights to appeal. That is precisely what happened in this case, where TMT has been wrongfully denied any appellate review of a judgment which, with interest, is rapidly approaching $50,000,000.

June 11, 1991

Respectfully submitted,

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